

**MINUTES
of the
THIRD MEETING
of the
RADIOACTIVE AND HAZARDOUS MATERIALS COMMITTEE**

**September 20, 2005
Santa Fe**

The third meeting of the Radioactive and Hazardous Materials Committee was called to order at 10:05 a.m. on Tuesday, September 20, 2005, by Senator Phil A. Griego, chair.

PRESENT

Sen. Phil A. Griego, Chair
Rep. John A. Heaton, Vice Chair
Rep. Donald E. Bratton
Sen. John T.L. Grubestic
Rep. Manuel G. Herrera
Sen. Gay G. Kernan
Sen. Carroll H. Leavell
Rep. Richard C. Martinez
Rep. Jeannette O. Wallace

ABSENT

Sen. Vernon D. Asbill
Rep. Antonio Lujan
Rep. Jim R. Trujillo

Advisory Members

Rep. Thomas A. Anderson
Sen. Mary Jane M. Garcia
Rep. Nick L. Salazar

Sen. Clinton D. Harden, Jr.
Sen. William H. Payne
Sen. John Pinto
Rep. Avon W. Wilson

Staff

Evan Blackstone
Gordon Meeks
Jeret Fleetwood

Guests

The guest list is in the original meeting file.

Issues Concerning the New Mexico Department of Environment's Assumption of Primacy over the National Pollution Discharge Elimination System (NPDES)

Randy Traynor, a lobbyist with the New Mexico Home Builders Association and the National Association of Industrial and Office Properties, began his presentation by explaining that numerous industry groups have been meeting over the past 18 months to discuss the complex primacy issue and how it affects their interests. He provided the committee with an overview of the NPDES program and how it is structured. He explained that the system is

contained within the federal Clean Water Act and that NPDES permits cover industrial and municipal water discharges, discharges from storm sewer systems in larger cities, storm water associated with numerous kinds of industrial activity and runoff from construction sites, mining operations and animal feedlots. Mr. Traynor also pointed out the differences between individual and general permits issued under NPDES. He emphasized that while the federal Environmental Protection Agency (EPA) currently handles permit requests for New Mexico out of its Region 6 office in Dallas, Texas, the New Mexico Environment Department (NMED) is seeking authorization from the federal government to issue NPDES permits. If the federal government delegates this permitting authority to NMED, the department would have primacy over the NPDES. Currently, 45 out of 50 states are authorized to administer their own NPDES program.

Next, Mr. Traynor described some of the changes NMED primacy over the NPDES would bring to New Mexico business and industry groups. He explained that NMED must be authorized by the state legislature through a statute to administer the program and the department must promulgate regulations at least as stringent as the federal program. He clarified that NMED plans to phase in primacy over several years and that the department will likely seek statutory authorization to begin phase one from the legislature during the upcoming legislative session. However, Mr. Traynor warned that a number of concerns expressed by New Mexico businesses and industries over how NMED plans to operate the NPDES permitting program have gone unaddressed. He went on to list several of those concerns, including how the state program will be budgeted, how NMED primacy will improve on the federal program and how primacy will influence the daily operations of the New Mexico business and industry groups affected. Mr. Traynor also stated that the EPA does not currently charge for permits and NMED will likely institute permitting fees.

Mike Bowen, executive director of the New Mexico Mining Association, summarized for the committee the mining industry's concerns with NMED assuming NPDES primacy. He echoed Mr. Traynor's concern that NMED may charge permitting fees under a primacy regime while the EPA currently does not charge for permits. However, Mr. Bowen indicated that the mining industry has been invited to work on NPDES primacy issues as part of a working group set up by NMED and continues to work in good faith to resolve problems before enabling legislation is brought.

John Horton, government affairs director for Associated General Contractors, also discussed concerns over NMED assuming primacy over NPDES permitting. He pointed out that the current system, in which contractors file storm water pollution plans for their construction sites with the EPA, seems to work well. Mr. Horton also discussed court decisions from two federal circuits that cited violations of the federal Endangered Species Act in requiring primacy to be transferred back from Louisiana and Arizona to the federal government. Finally, he cautioned the legislature to proceed slowly when considering legislation enabling NMED to take over NPDES primacy from the EPA.

Sharon Lombardi, executive director of the Dairy Producers of New Mexico, discussed the relationship of New Mexico dairy producers to the NPDES permitting process. She

explained that some dairy producers are required to have certain permits under NPDES, including concentrated animal feed operation (CAFO) permits and ground water discharge plans. She noted that most producers are applying for a general CAFO permit to cover their operations. However, because the CAFO permit for producers expired in 1998 and the process to obtain a new CAFO is still ongoing with the EPA, confusion over the waiting period and NMED's intention to gain NPDES primacy has caused several dairies to obtain individual permits.

Walter Bradley, representing the Dairy Farmers of America, expressed to the committee the concern that New Mexico does not have a clear definition of what surface waters of the state are subject to regulation. Mr. Bradley explained the differences between the definition of surface waters under the federal Clean Water Act and the New Mexico Water Quality Act. He stated that while NMED had initially agreed to keep its NPDES regulations as stringent as the federal ones, the state regulatory definition of surface waters is vague and presumably is much more stringent than the federal regulations. Mr. Bradley pointed out that some of the regulatory surface water definition is so broad that it could apply to golf course water hazards and possibly a depression in the middle of the desert that holds rainwater. He emphasized that the dairy farmers and producers he represents will not support NMED primacy over the NPDES system at this time. He urged the committee to consider issues regarding the potential financial and legal liability to the state that could result if there are difficulties in maintaining the program. Mr. Bradley noted that primacy will likely be expensive for New Mexico with a cost of the first phase of the program estimated at between \$700,000 and \$1.4 million.

Mr. Traynor summarized the comments of the previous speakers and emphasized that the legislature should proceed slowly in considering enabling legislation for primacy. He recognized that NMED has been diligent in posting the progress and work of the working group on the internet and thanked NMED for including business and industry in the process. However, he reiterated that the process is cumbersome and more work needs to be done to account for the concerns of the business and industry community.

Questions and comments included:

- whether NMED has the administrative capability to administer the NPDES program;
- intent of primacy and the concerns of the business and industry community;
- whether a need exists for New Mexico to assume primacy;
- whether the EPA is currently meeting the needs of the business and industry community under the current program;
- how New Mexico assuming primacy will improve on the program;
- the time frame for phasing in primacy;
- New Mexico taking more control over surface water as the reason for seeking to assume primacy;
- whether there is a dispute resolution process in EPA Region 6; and
- the need to look at other states' models who have assumed primacy over NPDES.

NMED: NPDES Primacy

Ron Curry, secretary of environment, Cindy Padilla, NMED Water and Waste Management Division director, Brent Moore, NMED Office of General Counsel, and Marcy Leavitt, NMED Surface Water Quality Bureau, provided the committee with further information regarding NMED's intention to assume primacy. They explained the NPDES program and NMED's motive for seeking assumption of primacy. Secretary Curry explained that NMED has been delegated primacy by the EPA for all other areas except for surface water. He emphasized that the issue is simply about providing better protection for New Mexico's surface water.

Secretary Curry clarified that while taking over the NPDES program will require several new full-time positions, resources such as corrective action funds and permit fees will help offset the cost. He also discussed the formation of the NPDES stakeholder work group, which was set up to address concerns such as those expressed by the business community over primacy. Finally, he outlined the potential benefits of NPDES primacy, including improved oversight of New Mexico's surface water resources, increased flexibility in permitting and fines and local oversight over NPDES programs. Furthermore, permit holders would be able to communicate with the NMED office in New Mexico as opposed to having to communicate with the EPA office in Dallas. Secretary Curry pointed out that in the long run, New Mexicans will be better off because NMED will be able to issue permits to fit its needs. Additionally, EPA Region 6 must devote a large number of its resources to Louisiana following the devastation caused by Hurricane Katrina. Secretary Curry concluded by maintaining that NMED has demonstrated it has operated efficiently in other areas where it has primacy and this is a strong reason for NPDES primacy.

Questions and comments included:

- whether NMED's proposed NPDES regulations will be clearly drafted before the legislature is asked to decide on primacy;
- the proposed fee schedule for NPDES permits to be issued by NMED;
- the fact that the Water Quality Commission, which would handle appeals of NMED fines for NPDES violations, is chaired by the secretary of environment and is therefore potentially biased toward the NMED;
- whether New Mexico would receive federal money for assuming primacy; and
- closed surface water basins in New Mexico.

On a motion made, seconded and unanimously approved, the minutes of the July 22-23 meeting were approved as submitted.

Mining Issues in New Mexico

Mike Bowen, executive director of the New Mexico Mining Association, provided an overview for the committee of the various mining operations in New Mexico. He explained that over 11 different minerals are mined in New Mexico, including copper, gold, molybdenum, potash, silver and uranium. Mr. Bowen also provided information regarding the locations of major mining operations in the state and the major mine operators. Finally, Mr. Bowen noted the various taxes paid to the state by the major mine operators in 2004.

Terrell Baker, also of the New Mexico Mining Association, gave the committee an update on the mining reclamation projects and initiatives currently being performed by Phelps Dodge Corporation and Molycorp. He explained that reclamation projects are undertaken by the mining industry pursuant to both the New Mexico Mining Act and other state and federal laws. He highlighted several of the larger mining reclamation efforts underway in the state, including those at Phelps Dodge's Tyrone and Chino mines and Molycorp's Goathill North Rockpile mitigation project.

Tony Trujillo, a lobbyist for Phelps Dodge, discussed several likely legislative issues regarding the mining industry. He pointed out the importance of mining to rural New Mexico and noted that while prices are relatively high for many of the minerals mined in the state, the regulatory climate in New Mexico does not encourage expanded production by the mining industry. Mr. Trujillo went on to discuss legislation likely to be introduced in upcoming legislative sessions that would impact the mining industry, such as the Air Quality Act and Hazardous Waste Act stringency restrictions, NPDES primacy, water use fees, the Accountability in Government Act, tax legislation and the Uniform Environmental Covenants Act.

Questions and comments included:

- reclamation efforts at the Cobre Mine;
- potash mining issues;
- uranium mining and reclamation issues;
- permit processing times; and
- community college training for mining engineers.

Rubber Recycling Solutions

Jerry Woosley, vice president of State Rubber Environmental Solutions, and Darrell Wells, technical representative for Wright Asphalt, described how rubber from recycled car tires can be converted into asphalt. They also noted a number of other uses for recycled rubber, including athletic fields, running tracks and flooring. Mr. Woosley and Mr. Wells also provided the committee with an overview of the rubber recycling process and discussed a number of technical reports detailing how asphalt manufactured with recycled rubber tends to outperform asphalt without rubber in its composition. Finally, they noted that although their respective companies are located in Texas, they are interested in using rubber tires from New Mexico in their products.

Questions and comments included:

- the amount of money in the Tire Recycling Fund and its distribution;
- fees paid by tire dealers to have tires removed from their businesses and whether those fees are passed on to the consumer;
- improvements made in rubberized asphalt; and
- the availability of technical data on the web sites of State Rubber Environmental Solutions and Wright Asphalt.

NMED: Update on Superfund Sites

Cindy Padilla and Bill Olsen, bureau chief of NMED's Ground Water Quality Bureau, updated the committee on the Superfund program activities in New Mexico. They began by providing an overview of the Superfund program, noting that Superfund generally refers to a federal environmental cleanup program to address hazardous substances that have been released into the environment. Mr. Olsen pointed out that although the program is not delegated to the states and is implemented by the EPA, NMED plays a key role in the program by performing site assessment and management assistance. Currently, New Mexico has 12 sites on the Superfund National Priorities List and one that is being considered for proposal to that list. Mr. Olsen provided the committee with a map detailing the location of those sites.

Mr. Olsen then discussed the successes, benefits and challenges regarding the cleanup of Superfund sites in New Mexico. NMED has cleanup activities completed entirely at four sites and partially completed at two sites. Additionally, one of the benefits of the Superfund program is that the availability of federal funds offsets cleanup costs that would otherwise be borne by states or municipalities. However, one of the challenges is that present federal funding levels are insufficient to meet program needs. To illustrate, they provided the committee with examples of the funding requirements for cleanup of several Superfund sites. Finally, Ms. Padilla and Mr. Olsen discussed the status of each of the 12 Superfund sites in New Mexico.

Questions and comments included:

- acronym definitions;
- duties of the Natural Resources Trustee; and
- the origin of contaminants at several specific sites.

There being no further business, the committee adjourned at 5:00 p.m.